No. 87-188

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RANDOM HOUSE, INC. and IAN HAMILTON,

Petitioners,

v.

JEROME D. SALINGER, a/k/a J.D. SALINGER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS IN SUPPORT OF THE PETITION

ROBERT H. CALLAGY
MARK A. FOWLER
SATTERLEE STEPHENS
BURKE & BURKE
230 Park Avenue
New York, New York 10169
(212) 818-9200

FLOYD ABRAMS
Counsel of Record
DEVEREUX CHATILLON
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioners

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REASONS FOR GRANTING THE WRIT

At the heart of respondent's brief is an attempt to persuade this Court that this case presents no issue worthy of the Court's review because this Court's decision in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) (hereinafter "*Harper & Row*"), supposedly addressed all the issues to be resolved. In the court below, however, respondent represented that "[t]his case presents novel questions on which there is little authority with respect to the scope of fair use of unpublished letters" (Brief of Plaintiff-Appellant at 2-3) and that

it involved "very difficult and real issues." (Reply Brief of Plaintiff-Appellant at 2) Respondent's earlier position is the correct one. As the Petition for Certiorari demonstrated and as nothing in respondent's brief refutes, this case presents questions well deserving of this Court's plenary review.

I.

The Court of Appeals' Prohibition on the Fair Use of Technically Unpublished Letters is a Serious Distortion of Copyright Law That Threatens Historical Scholarship

Respondent's brief entirely ignores the central policy question raised by this case — whether historians and biographers may make fair use of letters deposited and publicly displayed in libraries.[1] There is no doubt that, in the practice of their craft, responsible scholars have routinely quoted such sources, relying on the doctrine of fair use. *See* M. Benedict, *Historians and the Continuing Controversy Over Fair Use of Unpublished Manuscript Materials*, 91 Am. Historical Rev. 859, 863-64, 870 (Oct. 1986); Brief Amicus Curiae of Organization of American Historians at 3; Brief Amici Curiae of Kenneth S. Davis, John Hersey, A.E. Hotchner, Justin Kaplan, J. Anthony Lucas, and Ralph Martin at 14-17 (hereinafter "Biographers' Amicus Brief"). And there is no doubt that the Court of Appeals has now effectively prohibited this longstanding practice in holding that "[unpublished] works normally enjoy *complete* protection against copying *any* protected expression." (Pet'n App. A13 (emphasis added)) Indeed, this absolutist language seemingly forecloses scholars from reporting even the briefest quotations from — or paraphrases of — historically significant expression for the full term of United States copyright.

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[1] For the most part, Hamilton's biography does not directly quote from the letters deposited with the libraries. (Pet'n App. A23) However, the biography does quote certain of the excerpts from the library letters that have previously been published in the Sublette bibliography and elsewhere. (*Id.*)

The understanding of the scholarly community prior to this case regarding the use of unpublished materials is concisely summarized in a document entitled "Manuscript Copyright and Permission to Quote," distributed by the Manuscript Division of the Library of Congress.

> "Although the [Copyright] Act does not define the full limits or extent of fair use, it has been generally assumed that it permits the inclusion of brief quotations from unpublished manuscripts in scholarly and research publications."

The *Salinger* ruling is flatly inconsistent with this longstanding practice, one previously supported by cases such as *Estate of Hemingway v. Random House, Inc.*, 53 Misc. 2d 462, 279 N.Y.S.2d 51 (Sup. Ct. N.Y. Co.), *aff'd mem.*, 29 A.D.2d 633, 285 N.Y.S.2d 568 (1st Dep't 1967), *aff'd*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968).[2]

Nowhere in his brief does respondent address the propriety of the Court of Appeals' blanket restriction on copying technically unpublished but publicly disseminated letters. Mr. Salinger now instead argues that the Court of Appeals' opinion should be affirmed because this case is controlled by — and involves a rather routine application of — *Harper & Row*. In fact, the distinctions between *Harper & Row* and this case are both numerous and fundamental:

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[2] Respondent's argument that the *Hemingway* case did not involve the fair use of unpublished materials (*see* Resp. Br. at 11 n7) is mistaken and is based upon a misreading of the case. *See* 3 M. Nimmer, *Nimmer on Copyright* § 13.05, at 13-62 n2 (1987) (noting that fair use of unpublished works was expressly upheld in *Hemingway*); Note, *Copyright and Privacy Protection of Unpublished Works — The Author's Dilemma*, 13 Colum. J. L. & Soc. Probs. 351, 377 (1977).

Harper & Row	*Salinger*
The Ford Memoirs had been kept strictly confidential by their author, and were the subject of signed confidentiality agreements.	The letters were available in libraries for the public to read, and excerpts from many of the letters had previously been published in a scholarly bibliography and in newspapers and magazines.
Plaintiff was seeking only money damages.	Plaintiff is seeking and has obtained a prior restraint barring the publication of a biography of an important public figure.
Defendant had knowingly obtained and copied a purloined copy of the Ford Memoirs.	Hamilton did exactly what biographers are supposed to do; he ferreted out previously overlooked materials that had been deposited in libraries expressly for the purpose of scholarly research.[3]
The plaintiff demonstrated clear and quantifiable damages in the form of the cancellation by *Time* magazine of a contract for first serialization rights.	There was no evidence whatsoever of any damage to the value of the copyrighted work; the District Court expressly found that there was no damage; even the Second Circuit conceded there could at worst be only slight damage.

[3] Respondent's repeated reference to the library request forms signed by Mr. Hamilton is the reddest of red herrings. (*E.g.*, Resp. Br. at 3, 13, 24) Neither the District Court nor the Court of Appeals found that Hamilton had breached any duty he may have had to the libraries, and those forms played no part in the ruling of the Court of Appeals. (Pet'n App. A43-A44, A20)

The author had an interest in retaining creative control over the manuscript until it was published.	Salinger relinquished creative control over his letters when he dropped them in the mailbox.
Defendant had quoted the qualitative heart of the Ford Memoirs — the description of the Nixon pardon.	The District Court found that Hamilton had not taken the heart of the letters; and Salinger himself admitted that no one part of the letters was any more important than any other part.

The fact that the letters were disseminated is an especially important distinction between this case and *Harper & Row*.[4] As the legislative history of the Copyright Act indicates, House Comm., on Judiciary, 88th Cong., 1st Sess., *Copyright Law Revision — Part 2: Discussion and Comments on Report of the Registrar of Copyrights on General Revision of the U.S. Copyright Law*, 27 (Comm. Print 1963) (cited with approval in *Harper & Row*, 471 U.S. at 552), "[t]he rational and meaningful distinction, for fair use purposes, is between 'undisseminated' and 'disseminated' works." Biographers' Amicus Brief at 13. While respondent appears to argue that dissemination is irrelevant unless "voluntary" (Resp. Br. at 17-18), this argument simply ignores the fact that Mr. Salinger voluntarily mailed and thus disseminated these letters to their recipients. The recipients of the letters or their estates then further disseminated

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[4] As this Court observed in *Harper & Row*, dissemination amounts to *de facto* publication. 471 U.S. at 551-53. All of these letters have been "published" in the broad, original meaning of the word — they have been made available to the public. Portions of many letters have also been "published" in the traditional copyright sense of the word, having previously been quoted in the Sublette bibliography, *Story* magazine, *Philadelphia Sunday Bulletin*, and elsewhere. (*See* Pet'n at 5 n4) Respondent also argues that the publication in 1984 of the Sublette bibliography, which quoted 971 words from 36 of the Salinger letters, is not relevant to the issue of fair use. (Resp. Br. at 17-18) But the Sublette bibliography indisputably resulted in dissemination of the letters, further tipping the balance in favor of a finding of fair use.

these letters by lawfully depositing them in research libraries where the public is welcome to read them. *See* 1 M. Nimmer, *Nimmer on Copyright* § 5.04, at 5-32-33 (1987). Despite the fact that the very purpose of donating the letters to libraries was to make them readily available to scholars, Salinger insists that when it comes even to brief quotation or paraphrase, these letters are forbidden fruit.

The issues at stake in this case have immense, immediate, and continuing practical importance. While *Harper & Row* involved a rare instance of unauthorized access to an unpublished manuscript, this case involves the everyday occurrence of a scholar quoting unpublished but publicly available source materials. Any case that so changes previously understood law and practice to make such materials off-limits is well worthy of consideration by this Court.

II.

The Court of Appeals' Overly Expansive View of Expression Impermissibly Included the Report of Facts and Ideas

Respondent ostensibly takes no issue with the proposition set forth in *Harper & Row* that the law is "currently unsettled regarding the ways in which uncopyrightable elements combine with the author's original contributions to form protected expression," 471 U.S. at 548. Respondent nonetheless contends that what is at issue in this action is the application of "clear legal principles" regarding the definition of paraphrase "to the narrow facts of this case." (Resp. Br. at 15) Even a cursory examination of the decisions of the two courts below demonstrates the fallacy of this argument.

At his deposition, Mr. Hamilton explained the efforts he made to avoid impermissible paraphrase of the Salinger letters:

> "I had to think of these letters as being, as it were, literary works. Works by him, as if they were poems by him, say. Were I to take a poem by J.D. Salinger

> and I wished to report on the content of that poem or the ideas that it contained or the factual materials that lay within it, I would have to make certain that I didn't borrow from anything that was distinctively poetic. In other words, that which would make the poem a poem. That is literary devices that were peculiarly his devices. I had to keep that in mind constantly so that the work that I was writing was a different work. It was a work by me and not by him.
>
> * * *
>
> "The idea was not to quote his letters, as I understood it, because he didn't want his letters quoted and so it seemed to me that I still wanted to make use of the materials that were in the letters and I have a right to do so as biographer. It was in some respect important to my tale that I did." (C.A. App. Vol. II at 270-71)

Regrettably, the Court of Appeals misapprehended what Hamilton clearly understood. The Court of Appeals evidently confused the permissible report of facts contained in the letters with the copying of expression either by quotation or close paraphrase that can constitute an infringement, unless excused as a fair use.

Although the District Court meticulously identified each and every example of what it deemed to be impermissible paraphrase, the Court of Appeals spoke only in the vaguest of generalities. *See* Biographers' Amicus Brief at 20. As respondent has admitted, the Court of Appeals' approach to the paraphrase question was "I know it when I see it." (*See* Resp. Br. at 16) But the court made no effort whatsoever to articulate the principles it was applying. Five of the six examples of impermissible paraphrase cited by the Court of Appeals had already been classified as paraphrase by the District Court and discussed by that court under the doctrine of fair use. (*Compare* Pet'n App. A4-A5 n2, A18 n5 *with id.* A27-28 *and* Text Comparison at 5, 9)[5] With

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[5] The reference to the "Text Comparison" is to the color-coded exhibit made part of the record by the Court of Appeals that reflected a detailed analysis by the District Court of allegations of infringement. (*See* Pet'n at 8 n6)

respect to the sixth example (discussed at page 17 of the Petition), Hamilton did not copy Salinger's expression, but merely reported his idea.[6] The Court of Appeals did not discuss any examples of what it deemed to be errors on the part of the District Court in its handling of the idea-expression dichotomy. Thus, repondent is incorrect that there is no dispute about the legal definition of "paraphrase." (Resp. Br. at 15) The difference between reporting on facts and ideas and the close paraphrase that is the legal equivalent of quotation is both at issue here and sharply disputed between the two lower courts. In addition, because of the lack of definition in the Court of Appeals' decision, future biographers are left without a clue as to how they can accurately report upon the factual content of unpublished letters without running the risk of an injunction.[7]

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[6] Salinger wrote: "I suspect that money is a far greater distraction for the artist than hunger." Hamilton reported that Salinger believed, "Money, on the other hand, is a serious obstacle to creativity." The Petition focused on this example precisely because this was the one instance in which the Court of Appeals identified as paraphrase a passage which the District Court had characterized in the color-coded exhibit as a report of fact. (*See* Pet'n at 8 n6)

[7] In denying the petition for a rehearing, the Court of Appeals observed for the first time (and without a single example) that Hamilton's offense was tracking the "combination of ideas" in the Salinger letters. (Pet'n App. A48) But the Court of Appeals failed to recognize that, for the most part, Salinger's letters retell the events in his life in the chronological sequence in which they occurred. Of necessity, any biographer would be required to retell those events in the same order and Mr. Salinger can hardly be deemed to have a copyright interest in this natural sequence. Judge Learned Hand forcefully made this point in *Myers v. Mail & Express Co.*, 36 C.O. Bull. 478, 479 (S.D.N.Y. 1919):

> "[N]ot only are all the facts recorded in a history in the public domain, but, since the narration of history must proceed chronologically, — or at least, such is the convention, — the order in which the facts are reported must be the same in the case of a second supposed author."

III.

The Copyright Clause and the First Amendment do not Permit Enjoining a Scholarly Biography to Prevent Brief Quotation from Letters

Respondent has simply overlooked one significant question raised in the Petition: whether the construction of the Copyright Act adopted by the Court of Appeals is consistent with the Copyright clause of the Constitution, Art. I, Sec. 8, cl. 8. We repeat our view that to enjoin a scholarly biography that makes incidental use of letters cannot be said to promote "the progress of science and useful arts." (Pet'n at 19-20)

While ignoring this issue, respondent suggests that First Amendment values are not even implicated in this case. (Resp. Br. at 20-24) Yet in previously reported cases in which plaintiffs have attempted to block the appearance of a biography on copyright grounds, the courts have expressly considered the serious threat to free speech posed by a prepublication injunction and ultimately declined to issue a prior restraint. *See, e.g., Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Meeropol v. Nizer*, 361 F. Supp. 1063 (S.D.N.Y. 1973); *Estate of Hemingway v. Random House, Inc.*, 49 Misc. 2d 726, 268 N.Y.S.2d 531 (Sup. Ct. N.Y. Co.), *aff'd mem.*, 25 A.D.2d 719, 269 N.Y.S.2d 366 (1st Dep't 1966). The failure of the Court of Appeals even to consider the First Amendment implications of the prior restraint it was directing the District Court to enter is a significant departure from previous cases.[5]

Respondent and the Court of Appeals suggest that the First Amendment has no relevance because Hamilton can report the

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[5] The Court of Appeals also omitted all discussion of the public interest favoring publication of biographies, despite the fact that the public interest is always a factor to be considered when a plaintiff is seeking injunctive relief. *See, e.g., Yakus v. United States*, 321 U.S. 414, 440-41 (1944); *American Motorcyclist Ass'n v. Watt*, 714 F.2d 962 (9th Cir. 1983).

ideas in Salinger's letters as long as he does not come close to the expression therein. (Resp. Brief at 20-21; *see* Pet'n App. A19) Judicial experience with the idea-expression dichotomy, however, suggests that the line between an idea and the way it is expressed is extremely difficult to draw. *See Harper & Row*, 471 U.S. at 548. That being so, First Amendment values at least require that when the extraordinary remedy of injunctive relief is sought, care be taken to assure that sufficient breathing room remains to avoid the twin perils of censorship and self-censorship. By effectively forbidding quotation, by defining paraphrase so broadly as to imperil the most mundane recitation of facts, by permitting the routine issuance of injunctions on speech of serious social and educational value (Pet'n App. A40), the Court of Appeals has left biographers no leeway at all.

CONCLUSION

The Court of Appeals' holding in this case has already begun to stifle the preparation of new works of biography and history. Review by this Court is necessary to restore to biographers and historians the ability to make productive use of the publicly available source materials that are essential to their craft. For the foregoing reasons, and for the reasons set forth in the Petition, a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
September 21, 1987

Respectfully submitted,

ROBERT H. CALLAGY
MARK A. FOWLER
SATTERLEE STEPHENS
BURKE & BURKE
230 Park Avenue
New York, New York 10169
(212) 818-9200

FLOYD ABRAMS
Counsel of Record
DEVEREUX CHATILLON
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000